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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 504th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 12 July 1993, at 9.30 a.m.

Chairman: Mr. MORAN BOVIO (Spain)
later: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 9.45 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377, A/CN.9/378 and Add.1)

Consideration of draft Model Law on Procurement (continued)

Article 26

1. Mr. LEVY (Canada) suggested that in paragraph (1) "in effect" be replaced by "open for acceptance".

2. Mr. TUVAYANOND (Thailand) supported the suggestion.

3. Mr. WALLACE (United States of America) said that, although he had no strong feelings about the suggestion, the words "in effect" had a certain legal ring about them which "open for acceptance" lacked.

4. Mr. PHUA (Singapore) supported the suggestion and said he would support a similar amendment to article 21 (o).

5. The CHAIRMAN said he took it that the Commission wished to adopt paragraph (1) with the change suggested by the representative of Canada.

6. It was so decided.

7. The CHAIRMAN drew the Commission's attention to the Secretariat proposal in document A/CN.9/377 for amending subparagraph (2) (b) through deletion of the words "if it is not possible to do so".

8. Mr. TUVAYANOND (Thailand) said that the reference to "effectiveness" of tenders raised the problem of consistency with paragraph (1). He wondered whether the change in paragraph (1) should be reconsidered.

9. Mr. LEVY (Canada) suggested that the drafting group deal with the matter. He had no particularly strong feelings about the change.

10. The CHAIRMAN, noting that the matter would be referred to the drafting group, said he took it that the Commission wished to adopt paragraph (2) without the words "if it is not possible to do so".

11. It was so decided.

12. Mr. LEVY (Canada), drawing attention to document A/CN.9/376/Add.1, said that, as drafted, the first sentence of paragraph (3) was contrary to the law and contracting practices in Canada and some other countries with common law jurisdictions. In Canada, in the absence of other specific terms and conditions, a contract automatically arose upon the submission of a tender in response to an invitation. The leading case, which had been heard in the Supreme Court of Canada in 1981, was "Her Majesty the Queen in right of Ontario and the Water Resources Commission v. Ron Engineering and Construction (Eastern) Limited". The tenderer had discovered a mistake in the tender which would cost millions of dollars and had tried to withdraw the tender, although the solicitation documents had contained no provision for withdrawal. The

(Mr. Levy, Canada)

Supreme Court had found against the tenderer. In a subsequent case, "North-East Marine Services Limited v. Atlantic Pilotage Authority", the Federal Court had stated that the law on tendering had changed with the decision of the Supreme Court.

13. He said that paragraph (3) would change the present situation in a way which many procuring entities, suppliers and contractors would find disruptive and confusing, at least in Canada, and pointed out in that connection that the Government of Japan had indicated in document A/CN.9/376/Add.2 that the withdrawal of tenders was not permitted in Japan.

14. The problem could be resolved if paragraph (3) was modified so as to permit the solicitation documents to state when, if at all, a tender could be withdrawn without forfeiture of the tender security. He proposed that paragraph (3) start with the phrase "If so provided for in the solicitation documents,".

15. Mr. UEMURA (Japan), noting that the withdrawal of tenders was indeed not permitted under Japanese law, said that paragraph (3) should be amended so as to enable the procuring entity to restrict or prohibit the modification or withdrawal of tenders after their submission.

16. Mr. GRIFFITH (Observer for Australia) said that under the common law of his country a tenderer could withdraw a tender after submission unless specifically prohibited from doing so by the solicitation documents.

17. In order to cover all eventualities, perhaps paragraph (3) should state that, if the solicitation documents contained no specific provisions, the ordinary law of the country would prevail, but, if the solicitation documents contained provisions concerning the withdrawal or modification of tenders, those provisions would apply.

18. Ms. PIAGGI-VANOSSI (Argentina), noting that in the Spanish version of paragraph (3) "oferta" would be a better translation of "tender" than "licitación", said that the suggestion made by the Australian delegation seemed a good one.

19. Mr. TUVAYANOND (Thailand) said that perhaps the procuring entity should be allowed to decide whether modification or withdrawal of a tender prior to the submission deadline was permissible. That could be achieved by a phrase such as "Unless otherwise stipulated in the solicitation documents" at the beginning of paragraph (3).

20. Mr. JAMES (United Kingdom) said that, in his view, it was normal that the withdrawal of a tender prior to the submission deadline should be permitted; the real issue was whether the tender security should be forfeited in such a case. He did not think that procuring entities should be encouraged to introduce conditions that would lead to forfeiture of the tender security if the tender was modified or withdrawn prior to the deadline, and he felt it might be wiser to leave paragraph (3) as it stood. If paragraph (3) were to be amended along the lines proposed by the representative of Canada, that would have implications for subparagraph (1) (f) of article 27.

21. Mr. SAHAYDACHNY (Secretariat) said that, when the provision under discussion had been considered at the eleventh session of the Working Group, the Secretariat had been asked to find out what the general practice was in that regard. As he recalled it, the Secretariat's researches had indicated that the provision set forth in the first sentence of paragraph (3) was typical of what was provided for in national legislation.

22. Mr. AZZIMAN (Morocco) said that, in his view, it was illogical to prevent the supplier or contractor from modifying or withdrawing the tender prior to the submission deadline. Accordingly, he had difficulties with the Canadian representative's proposal.

23. Mr. TUVAYANOND (Thailand) said that, while he saw no harm in allowing procuring entities to stipulate that the tender security would be forfeited under specified circumstances, he also did not think that procuring entities should actually be encouraged to make such stipulations. In his opinion, the words "Unless otherwise stipulated in the solicitation documents" would leave procuring entities with the flexibility they needed.

24. Ms. ZIMMERMAN (Canada), recalling her delegation's proposal, said that she could go along with something on the lines of what had been suggested by the observer for Australia.

25. Mr. WALLACE (United States of America) said that he would prefer the phrase "Unless otherwise stipulated in the solicitation documents" suggested by the representative of Thailand.

26. He agreed that changes would be necessary in article 27 - and perhaps also in article 26 (1); in fact, he thought that the second sentence of article 26 (1) could in any case be deleted.

27. Mr. GRIFFITH (Observer for Australia) supported the wording suggested by the representative of Thailand.

28. Mr. LEVY (Canada) said that his delegation could also accept that wording.

29. Mr. JAMES (United Kingdom) said that he could go along with the suggested wording, which would, however, entail changes in articles 21 and 27.

30. The CHAIRMAN said that the drafting group would look into the question of consequential changes and asked the Commission whether it could accept paragraph (3) with the phrase "Unless otherwise stipulated in the solicitation documents," placed at the beginning.

31. It was so decided.

32. The CHAIRMAN, recalling that shortly before the Commission had adopted paragraph (1) with the words "in effect" replaced by "open for acceptance", invited comments on the suggestion by the representative of the United States that the second sentence of the paragraph could well be deleted.

33. Ms. CRISTEA (Observer for Romania) said that, in her view, the second sentence of paragraph (1) served a useful purpose and should therefore be retained.

34. Mr. TUVAYANOND (Thailand), supporting deletion of the second sentence, said that the first sentence was sufficient on its own.

35. Mr. GRIFFITH (Observer for Australia), also supporting deletion of the second sentence, said that the amendment to paragraph (3) which the Commission had just accepted would make it possible for the procuring entity to require that the tender not be withdrawn prior to the submission deadline. That meant that the tender would be open for acceptance prior to the deadline, so that it did not seem very helpful to have a sentence stating when the period of time during which the tender would be open for acceptance would commence.

36. Mr. LEVY (Canada) supported deletion of the second sentence of paragraph (1).

37. Mr. JAMES (United Kingdom) said he had no objection to deletion of the second sentence of paragraph (1). However, there would then be a strong case for retaining the words "in effect" in the first sentence of that paragraph.

38. Mr. GRIFFITH (Observer for Australia) suggested that the point raised by the representative of the United Kingdom be left to the drafting group.

39. The CHAIRMAN said there seemed to be general agreement that the second sentence of paragraph (1) should be deleted.

40. It was so decided.

41. Mr. Mohammed (Nigeria) took the Chair.

Article 27

42. Mr. SAHAYDACHNY (Secretariat), recalling that the Commission had shortly before accepted paragraph (3) of article 26 with the phrase "Unless otherwise stipulated in the solicitation documents," placed at the beginning, said that subparagraph (1) (f) (i) of article 27 would require the addition of a phrase on the lines of "or before the deadline if so stipulated in the solicitation documents".

43. Subparagraph (1) (a) was adopted.

44. Mr. PEREZNIETO CASTRO (Mexico), supported by Mr. MORAN BOVIO (Spain), suggested that in subparagraph (1) (b) the words "or entity" be deleted from the phrase "institution or entity", since in Spanish "entity" might easily be taken to mean the procuring entity.

45. Mr. JAMES (United Kingdom) felt that in English the word "institution" alone was probably not sufficient. The matter seemed to be one of translation and should be referred to the drafting group.

46. Mr. HERRMANN (Secretary of the Commission) said that it might be worth considering use of the phrase "institution or person".

47. Mr. LEVY (Canada) supported the replacement of "or entity" by "or person".

48. Mr. WALLACE (United States of America) asked whether consequential changes would not have to be made in subparagraphs (1) (c), (d), (e) and - possibly - (f).

49. Mr. AL-NASSER (Saudi Arabia) proposed that the expression "financial institution" be used.

50. Mr. MORAN BOVIO (Spain), supporting the replacement of "or entity" by "or person", said that the word "institution" should not be qualified as it covered both financial institutions and non-financial institutions such as insurance companies.

51. Mr. HERRMANN (Secretary of the Commission) said that the change of "or entity" to "or person" in subparagraph (1) (b) would obviously entail consequential changes in the subsequent subparagraphs.

52. With regard to subparagraphs (d) and (e), he suggested that "confirming institution" be replaced by "confirmer".

53. Mr. PARRA PEREZ (Observer for Venezuela) said that the tender securities envisaged in article 27 appeared to be "personal securities" and not "real securities" such as mortgages. Should the Model Law not deal also with the provision of "real securities"?

54. Mr. LEVY (Canada) felt that the point raised by the observer for Venezuela was covered by the words "nature ... of any tender security to be provided ..." in paragraph (1) of article 21.

55. Mr. WALLACE (United States of America) felt that the definition of "tender security" in paragraph (g) of article (2) was broad enough to cover the types of security envisaged by the observer for Venezuela.

56. Mr. MORAN BOVIO (Spain) said that the concept of "real security" was a complicated one and that the type of security needed in the context of the Model Law was one which would easily meet the requirements of the procuring entity.

57. The CHAIRMAN took it that the Commission wished the words "or entity" to be replaced by "or person" in subparagraphs (1) (b) and (c), the words "confirming institution" to be replaced by "confirmer" in subparagraphs (d) and (e), and subparagraph (1) (f) (i) to be brought into line with paragraph (3) of article 26 as accepted by the Commission.

58. It was so decided.

59. Mr. MORAN BOVIO (Spain) said he would like the drafting group to consider inserting a comma after the word "aceptables" in the Spanish version of subparagraph (1) (e).

60. Mr. TUVAYANOND (Thailand) proposed that in the chapeau of paragraph (2) the words "without delay" be replaced by "without undue delay" or "promptly".

61. Mr. LEVY (Canada) said he would prefer "promptly".

62. Mr. MORAN BOVIO (Spain) said he saw no need for a change in the Spanish version of the chapeau.

63. Mr. AZZIMAN (Morocco) said he saw no need for a change in the Arabic and French versions either.

64. The CHAIRMAN took it that the Commission wished "without delay" to be replaced by "promptly".

65. It was so decided.

66. Mr. AZZIMAN (Morocco) suggested that the French version of subparagraph (2) (a) be amended to read "Expiration du délai de la garantie de soumission".

67. Mr. TUVAYANOND (Thailand) suggested that in subparagraph (2) (b) the phrase "by the solicitation documents" be added after "if such a security is required".

68. Mr. JAMES (United Kingdom) said that subparagraph (2) (d) would also need to be brought into line with paragraph (3) of article 6 as accepted by the Commission.

69. Mr. TUVAYANOND (Thailand) said that, in his opinion, the whole of subparagraph (2) (d) after the words "the withdrawal of the tender" could be deleted.

70. Mr. WALLACE (United States of America) said that such a deletion would be a substantive change. It was not something that could be left to the drafting group to decide on.

71. Mr. LEVY (Canada) suggested that the drafting group consider adding "modification or" before "withdrawal" in subparagraph (2) (d) in order to bring the wording into line with that of paragraph (3) of article 26.

72. Mr. TUVAYANOND (Thailand) said he was not sure whether it would be a good idea to add the words "modification or".

73. Mr. AZZIMAN (Morocco) said that the drafting group should not exclude the possibility of leaving subparagraph (2) (d) unchanged.

74. The CHAIRMAN, recalling that the Commission had already agreed that "without delay" should be replaced by "promptly" in the chapeau of paragraph (2), said that, in bringing the paragraph into line with paragraph (3) of article 26 as accepted by the Commission, the drafting group could consider the other suggestions which had been made during the Commission's discussion of paragraph (2).

The meeting rose at 12.30 p.m.